INTEREST OF THE AMICUS CURIAE

The interest of amicus curiae National Automobile Dealers Association has been described in the preceding motion for leave to file this brief in support of petitioners' petition for writ of certiorari.[1]

STATEMENT OF THE CASE

The Decision Below

The Court of Appeals for the First Circuit held in this case that a motor vehicle manufacturer does not violate the Automobile Dealers Day in Court Act, 15 U.S.C. §§ 1221-1225, when it withholds desired vehicles from its dealers in an attempt to force the dealers to purchase unwanted accessories. *George Lussier Enterprises, Inc. v. Subaru of New England, Inc.*, 393 F.3d 36 (1st Cir. 2004); Petitioners' App. at 20. The First Circuit held that such conduct was not coercion under the Act unless the dealers had a contractual right to the vehicles withheld. *Id.* The First Circuit denied en banc review.

Statutory Background

In 1956, Congress enacted the Automobile Dealers Day in Court Act, 15 U.S.C. §§ 1221-1225. The ADDCA gives automobile dealers the right to recover damages from manufacturers who fail "to act in good faith in performing

---

[1] Pursuant to Rule 37.6 of the Rules of the Court, counsel for the amicus curiae states that no counsel for any party authored this brief in whole or in part and that no person or entity other than the amicus curiae, its members or its counsel has made a monetary contribution to the preparation or submission of this brief.

or complying with any of the terms or provisions of the franchise, or in terminating, canceling, or not renewing the franchise with said dealer." 15 U.S.C. § 1222.

"Good faith" is defined as "the duty of each party to any franchise . . . to act in a fair and equitable manner toward each other so as to guarantee the one party freedom from coercion, intimation, or threats of coercion or intimation from the other party." 15 U.S.C. § 1221(e). However, "recommendation, endorsement, exposition, persuasion, urging or argument shall not be deemed to constitute a lack of good faith." *Id.*

As the Court of Appeals for the Tenth Circuit has pointed out, Congress explained that under the ADDCA:

> "The existence of coercion or intimidation depends upon the circumstances arising in each particular case and may be inferred from a course of conduct. *For example, manufacturer pressure, direct or indirect, upon a dealer to accept automobiles, parts, accessories, or supplies which the dealer does not need, want, or feel the market is able to absorb, may in appropriate instances constitute coercion or intimidation.* Similarly coercion or intimidation may be found where the manufacturer attempts to require the dealer to handle exclusively, or sell a specified quota of, parts, accessories, and tools made or approved by the manufacturer."

American Motors Sales Corp. v. Semke, 384 F.2d 192, 196 (10th Cir. 1967) (quoting 1956 U.S. Code Cong. & Admin. News, p. 4603) (emphasis added).

The legislative history of the ADDCA shows that its purpose was to provide a federal cause of action and a counterweight to one-sided franchise contracts. H.R. REP. NO. 2850, 84th Cong., 2d Sess., reprinted in 1956 U.S. Code Cong. & Admin. News, p. 4596. Recognizing this legislative intent, circuit courts have held that Congress

enacted the ADDCA to create a new level of protection that does not depend on contract terms. *Hanley v. Chrysler Motors Corp.*, 433 F.2d 708, 710 (10th Cir. 1970); *Globe Motors, Inc. v. Studebaker-Packard Corp.*, 328 F.2d 645, 646 (3d Cir. 1964).

SUMMARY OF THE ARGUMENT

The Court of Appeals for the First Circuit erred in holding that the test under Automobile Dealers Day in Court Act, 15 U.S.C. § 1221-1225, for a coercive sanction is based solely on contractual rights. Moreover, the case law demonstrates that there is disagreement among the circuit courts regarding the proper test for "coercion" under the Act. Although the circuit courts generally agree that coercion requires a "wrongful demand" that will result in "sanctions," they disagree as to the meaning of these terms. By granting the petition for writ of certiorari, the Supreme Court can eliminate the disparate judicial results and formulate a uniform test for coercion under this important federal statute.

REASONS FOR GRANTING THE WRIT

I. INCONSISTENT CIRCUIT COURT HOLDINGS AS TO THE TEST FOR "COERCION"

United States Supreme Court review of the decision by the Court of Appeals for the First Circuit is needed to clarify the "coercion" element of the Automobile Dealers Day in Court Act ("ADDCA"), 15 U.S.C. §§ 1221-1225, particularly as that element relates to a manufacturer withholding desired vehicles in an attempt to force dealers to do something that benefits the manufacturers, but not necessarily the dealers. This practice has been addressed in lower federal court rulings on many occasions since the ADDCA's enactment nearly 50 years ago, however, with disparate results. This case presents an opportunity for the Supreme Court to resolve the conflicts among the circuit courts concerning an important federal statute that

governs an industry that has a significant impact on the United States economy.

Other than acknowledging that the purpose of the ADDCA is to protect motor vehicle dealers from abuses arising from a manufacturer's superior bargaining power, *see New Motor Vehicle Bd. of Calif. v. Orrin W. Fox Co.*, 439 U.S. 96, 100-01 & n.4 (1978), the Supreme Court has never had an occasion to construe or apply the ADDCA. As explained earlier, the circuit courts have held generally that a lack of good faith under the ADDCA requires a showing of "coercion." *Wallace Motor Sales, Inc. v. American Motor Sales Corp.*, 780 F.2d 1049 (1st Cir. 1985); *Milos v. Ford Motor Co.*, 317 F.2d 712 (3d Cir. 1963), *cert. denied*, 375 U.S. 896 (1963); *Minson Plymouth, Inc. v. Chrysler Motors Corp.*, 554 F.2d 1266 (4th Cir. 1977); *Hanley v. Chrysler Motors Corp.*, 433 F.2d 708 (10th Cir. 1970). Moreover, circuit courts have established a fairly uniform test for "coercion," construing it as requiring a "wrongful demand" by the manufacturer that will result in "sanctions" if ignored by the dealer. *Autohaus Brugger, Inc. v. Saab Motors, Inc.*, 567 F.2d 901, 911 (9th Cir. 1978), *cert. denied*, 436 U.S. 946 (1978); *Wallace Motor Sales*, 780 F.2d at 1056.

Although there is general agreement about the two components of the coercion test, material disagreements exist among the circuit courts concerning what constitutes a "wrongful demand" and what constitutes "sanctions."

II. CONFLICT AMONG CIRCUIT COURTS AS TO "WRONGFUL DEMAND"

Some circuit courts have adopted a test to determine whether a manufacturer's demand is coercive by deciding whether a dealer's compliance with a manufacturer's demand benefits only the manufacturer or both parties. In *Volkswagen Interamericana, S.A. v. Rohlsen*, 360 F.2d 437, 442 (1st Cir. 1966), *cert. denied*, 385 U.S. 919 (1966), the First Circuit noted that, when a dealer's compliance with a manufacturer's demand would "benefit only, or primar-

ily, the manufacturer," the demand was "[p]articularly suspect." This is known as the one-sided benefit test.

Although the First Circuit now labels its one-sided benefit test as dicta, *see George Lussier*, 393 F.3d at 45; Petitioners' App. at 30, the test has been adopted by several circuit courts, including the Eleventh and Second Circuits. *See Cabriolet Porsche Audi, Inc. v. American Honda Motor Co.*, 773 F.2d 1193, 1210 (11th Cir. 1985), *cert. denied*, 475 U.S. 1122 (1986) (distributor's "suggestion did not present a [demand] which benefit[ed] only, or primarily, the manufacturer'") (quoting *Rohlsen*, 360 F.2d at 442); *Autowest, Inc. v. Peugeot, Inc.*, 434 F.2d 556, 561-62 (2d Cir. 1970) (demand that benefits only the manufacturer is "'[p]articularly suspect,' [and] can be easily extorted by the manufacturer at the dealer's expense") (quoting *Rohlsen*, 360 F.2d at 442). In addition, as petitioners point out in their petition, numerous district courts have followed suit and adopted the one-sided benefit test enunciated in *Rohlsen*. *See* Petitioners' Pet. for Writ of Cert. at 12-13 (collecting cases).

The fact that the First Circuit subsequently disavowed its own one-sided benefit test coupled with the fact that other courts have since adopted it only underscores the need for Supreme Court review. Moreover, whether the one-sided benefit test is adopted does not put an end to the disagreement because, unlike the First Circuit in this case, other circuit courts have construed a demand that requires a dealer to buy unwanted vehicles or accessories to be a wrongful demand and, hence, coercion under the ADDCA.

One of the principal evils that the ADDCA was designed to stop was the exertion of pressure by manufacturers on dealers to buy unwanted vehicles, parts, accessories or supplies. *Woodard v. General Motors Corp.*, 298 F.2d 121, 128 (5th Cir. 1962), *cert. denied*, 369 U.S. 887 (1962) ("'The principal effect of the bill . . . is to give the dealer a right of action against the manufacturer, where the manufacturer fails to act in a fair and equitable manner so as to guarantee the dealer freedom from coercion, intimidation or threats of coercion or intimidation.'") (citing S. REP. NO.

2073, 84th Cong., 2d Sess. 2); *see also American Motors Sales Corp. v. Semke*, 384 F.2d 192, 196 (10th Cir. 1967) ("'manufacturer pressure, direct or indirect, upon a dealer to accept automobiles, parts, accessories, or supplies which the dealer does not need, want, or feel the market is able to absorb, may in appropriate instances constitute coercion or intimidation'") (quoting 1956 U.S. Code Cong. & Admin. News, p. 4603).

Unlike the First Circuit's holding in this case, other circuit courts have held that a manufacturer's demand that a dealer buy unwanted vehicles or accessories constitutes a wrongful, coercive demand under the ADDCA. *See, e.g., David R. McGeorge Car Co. v. Leyland Motor Sales, Inc.*, 504 F.2d 52, 56 & n.7 (4th Cir. 1974), *cert. denied*, 420 U.S. 992 (1975) ("it now appears to be settled that a manufacturer's coercive attempt to force unwanted automobiles on a dealer constitutes bad faith dealing for purposes of the Act"); *American Motors Sales*, 384 F.2d at 196-97 (manufacturer's demand that the dealer order unwanted cars in order to receive desired cars was coercive).

Moreover, at least 35 states expressly prohibit manufacturers from coercing dealers into buying unwanted vehicles, parts or accessories.[2] The First Circuit held in this case and several other circuit courts have held in other cases that the standard for coercion under the ADDCA is

---

[2] Ala. Code § 8-20-4; Ariz. Rev. Stat. § 28-4458; Ark. Code § 23-112-403; Cal. Code § 11713.2; Colo. Rev. Stat. § 12-6-120; Conn. Gen. Stat. § 42-133bb; Del. Code. § 4913; Ga. Code § 10-1-661; Idaho Code § 49-1613; 815 Ill. Comp. Stat. 710/4; Ind. Code § 9-23-3-8; Ky. Rev. Stat. § 190.070; Me. Rev. Stat. § 1174; Mass. Gen. Laws ch. 93B, § 4(b); Mich. Comp. Laws § 445.1573; Minn. Stat. § 80E.12; Miss. Code § 63-17-73; Mo. Rev. Stat. § 407.825; Mont. Code § 61-4-208; Neb. Rev. Stat. § 60-1436; Nev. Rev. Stat. § 5; N.H. Rev. Stat. § 357-C:3; N.M. Stat. § 57-16-5; N.Y. Law § 463; N.C. Gen. Stat. § 20-304; Ohio Rev. Code § 4517.41; Or. Rev. Stat. § 650.130; Pa. Cons. Stat. § 12; R.I. Gen. Laws § 31-5.1-3; S.C. Code § 56-15-30; Utah Code § Part 2; Vt. Stat. tit. 9, § 4096; Va. Code § 46.2-1569; W. Va. Code § 17A-6A-10; Wis. Stat. § 218.0116(1)(h).

the same as the standard under state law. *George Lussier*, 393 F.3d at 47 (collecting cases); Petitioners' App. at 32; *see also Hubbard Chevrolet Co. v. General Motors Corp.*, 873 F.2d 873, 876 (5th Cir. 1989), *cert. denied*, 493 U.S. 978 (1989); *Gage v. General Motors Corp.*, 796 F.2d 345, 350-51 (10th Cir. 1986). However, the state laws provide expressly that a manufacturer demand that dealers buy unwanted vehicles, parts or accessories as a wrongful demand and improper.

As a result, the debate extends beyond the circuit courts and implicates the interpretation of state law as well.[3] Logically, if the test for coercion under the ADDCA is equivalent to the test under these state laws, a demand that dealers buy unwanted accessories that is deemed wrongful under state law must also be wrongful under the ADDCA.

III. CONFLICT AMONG CIRCUIT COURTS AS TO "SANCTIONS"

Circuit court holdings have been particularly disparate in cases in which a manufacturer engages in the practice of withholding desired automobiles from dealers in an attempt to force the dealers to take some action that they would not take otherwise. As with unwanted accessories, the circuit courts are at loggerheads over the meaning of "sanctions" in this situation.

For example, withholding desired automobiles has been held to be a sanction in *American Motors Sales Corp. v. Semke*, 384 F.2d 192 (10th Cir. 1967); *Rea v. Ford Motor Co.*, 497 F.2d 577 (3d Cir. 1974), *cert. denied*, 419 U.S. 868 (1974); *David R. McGeorge Car Co. v. Leyland Motors Sales, Inc.*, 504 F.2d 52 (4th Cir. 1974) *cert. denied*, 420

[3] To the extent that the First Circuit's contractual rights test is deemed the test for coercion, NADA contends that state statutes apply a broader standard. However, petitioners do not challenge the First Circuit's ruling that the test for coercion is the same under the ADDCA and state laws. Therefore, NADA accepts that ruling for purposes of this brief.

U.S. 992 (1975); *Randy's Studebaker Sales, Inc. v. Nissan Motor Corp.*, 533 F.2d 510 (10th Cir. 1976); *Junikki Imports, Inc. v. Toyota Motor Co.*, 335 F. Supp. 593 (N.D. Ill. 1971); *Evanston Motor Co. v. Mid-Southern Toyota Distributors, Inc.*, 436 F. Supp. 1370 (N.D. Ill. 1977); *Speed Auto Sales, Inc. v. American Motors Corp.*, 477 F. Supp. 1193 (E.D.N.Y. 1979). However, withholding desired automobiles has been held not to be a sanction in *Southern Rambler Sales, Inc. v. American Motors Corp.*, 375 F.2d 932 (5th Cir. 1967), *cert. denied*, 389 U.S. 832 (1967); *Overseas Motors, Inc. v. Import Motors, Ltd.*, 519 F.2d 119 (6th Cir. 1975), *cert. denied*, 423 U.S. 987 (1975); *Colonial Dodge, Inc. v. Chrysler Corporation*, 11 F. Supp. 2d 737 (D. Md. 1996), *aff'd*, 121 F.3d 697 (4th Cir. 1997).

In this case, the First Circuit held that withholding desired vehicles was not coercion unless the dealers could show that they were contractually entitled to the vehicles withheld. *George Lussier*, 393 F.3d at 44; Petitioners' App. at 27. However, this holding defies Congress' intent in enacting the ADDCA, which was to protect dealers from abusive and oppressive acts by manufacturers that result from the manufacturer's superior bargaining power over its dealers. *Orrin W. Fox*, 439 U.S. at 100-01 & n.5. The imbalance in bargaining power allows a manufacturer to draft a franchise agreement with terms most favorable to it and the dealer has no choice but to accept the agreement without changes. *See, e.g.*, STEWART MACAULAY, LAW AND THE BALANCE OF POWER: THE AUTOMOBILE MANUFACTURERS AND THEIR DEALERS 9 (1966); Harold Brown and Jerry Cohen, *Franchising; Constitutional Considerations for "Good Cause" State Legislation*, 16 HOUS. L. REV. 21, 26 (1978-79); Harold Brown, *A Bill of Rights for Auto Dealers*, 12 B.C. INDUS. & COMM. L. REV. 757, 769 (1971).

As a result of this well-known power imbalance, the ADDCA created a new level of protection for dealers that does not depend on contract terms. *Hanley v. Chrysler Motors Corp.*, 433 F.2d 708, 710 (10th Cir. 1970) (ADDCA creates a new cause of action, other than breach of contract, that did not exist before); *see also Globe Motors, Inc.*

v. Studebaker-Packard Corp., 328 F.2d 645, 646 (3d Cir. 1964) (ADDCA "did not provide a new remedy for breach of contract but created a new cause of action"). By making a violation of the ADDCA dependent on showing that the manufacturer breached its contractual obligations, the First Circuit has eviscerated the ADDCA and rendered it meaningless. Moreover, the First Circuit's holding conflicts with the holdings of the Third and Tenth Circuits. *Id.*

The facts in this case show that the dealers were required to purchase unwanted accessories (which is a "wrongful demand") or be denied access to over 30% of the total supply of vehicles that Subaru of New England made available to its dealers (which is a "sanction"). There is no evidence that the dealers voluntarily agreed that Subaru of New England could withhold 30% of its total vehicle allocation from dealers who did not purchase unwanted accessories. Subaru of New England exploited its superior bargaining power to create a substantial pool of desired vehicles to use for this purpose. Because manufacturers unilaterally control the allocation of vehicles to their dealers, it is virtually impossible for dealers to have a contractual right to any specific vehicles.

Notwithstanding the absence of a contractual right, the manufacturer's control over the supply of vehicles is an "important sanction" that the manufacturer can use to force its will on its dealers. MACAULAY, *supra*, at 12. The motor vehicle franchise system allows manufacturers to avoid the large capital investment in sales outlets and service facilities necessary to render consumer demanded services by shifting these investment costs to their dealers. *See, e.g.*, Note, *State Motor Vehicle Franchise Legislation: A Survey and Due Process Challenge to Board Compensation*, 33 VAND. L. REV. 385, 387 (1980); MACAULAY, *supra*, at 6. Large capital investments make the dealer dependent on the manufacturer and subject to the manufacturer's dictates, whether or not they are fair or reasonable. MACAULAY, *supra*, at 11-12; BROWN, *supra*, at 760-61. Whether a dealer receives "an appropriate selection of different types of cars and trucks" from the manufacturer

directly affects its return on investment. MACAULAY, *supra*, at 6. Moreover, it is well known that franchise agreements obligate the dealer to "sell as many cars as dealers in similar areas sell." *Id.* at 7.

In this case, the dealer agreements drafted by Subaru of New England provide that each dealer must achieve "a level of registrations on an annual basis in the dealer's area of responsibility reasonably comparable, in respect of import make automobile market penetration, to that attained *on the average* by all other dealers appointed by distributor in their respective areas of responsibility." Court of Appeals App. at 1003 (emphasis added); *see also George Lussier*, 393 F.3d at 41 ("Essentially, the more cars the dealer sold, the more cars they would earn in future allocations."); Petitioners' App. at 22. Therefore, if a dealer receives less than the average supply of vehicles relative to the registrations in its market, the dealer may not achieve average sales performance, which, in turn, makes the dealer's franchise vulnerable to cancellation by the manufacturer.

Because of the substantial capital investments and contractual obligations needed to achieve average sales performance, dealers have no real choice other than to do what is necessary to have full access to the entire pool of motor vehicles that the manufacturer supplies to its dealers. Thus, it is coercion for a manufacturer to withhold a substantial portion of that pool from dealers who choose not to buy unwanted accessories. Recognizing this reality, the Supreme Court has held previously that "discrimination in the shipment of automobiles, as a means of influencing dealers to use [the manufacturer's wholly owned credit subsidiary]" was a practice that "fall[s] within the common understanding of 'coercion'. . . ." *Ford Motor Co. v. United States*, 335 U.S. 303, 317 (1948).

The appropriate test for coercion should be whether the alleged coercive conduct leaves the dealers with no choice but to comply with the manufacturer's wrongful demand. Such a test is consistent with the common meaning of the term "coercion," particularly with respect to economic

coercion, which presumably is what Congress had in mind when it enacted the ADDCA.[4] The word "coerce" means:

> to restrain, control, or dominate, mollifying individual will or desire (as by force, power, violence, or intimidation) . . . to compel to an act or choice by force, threat, or other pressure . . . to effect, bring about, establish or enforce by force threat, or other pressure.

WEBSTER'S THIRD NEW INTERN'L DICTIONARY 439 (1986). The common definition includes the use of economic pressure to compel someone to do what he or she would not choose to do otherwise.

Because the circuit courts disagree as to what constitutes a "wrongful demand" and what constitutes "sanctions" as those terms are used to describe coercion under the ADDCA, this case presents an opportunity for the Supreme Court to clarify the law and ensure consistent legal holdings throughout the circuit courts.

CONCLUSION

The Court of Appeals for the First Circuit erred in holding that the test for "coercion" under the Automobile Dealers Day in Court Act is based solely on contractual rights. Moreover, the case law demonstrates that there is a disagreement among the circuit courts regarding the proper test for coercion under the Act. Accordingly, the Supreme Court should grant petitioners' petition for writ of certiorari in order to formulate a consistent and uniform test for this important federal statute.

---

[4] The legislative history of the ADDCA focuses on the economic coercion that dealers suffer at the hands of manufacturers after the dealers have made substantial capital investments in facilities, equipment and training to represent the manufacturer's products, as opposed to physical coercion. *See, e.g.*, MACAULAY, *supra*, at 5-12; BROWN, *supra*, at 760-61.

Respectfully submitted,

Paul R. Norman
Counsel of Record
Catherine Cetrangolo
Boardman, Suhr, Curry & Field LLP
One South Pinckney Street, Fourth Fl.
P.O. Box 927
Madison, Wisconsin 53701-0927
(608) 257-9521

Counsel for Amicus Curiae
National Automobile Dealers Association